IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	

GOVERNMENT'S RESPONSE IN OPPOSITION TO STANDBY COUNSEL'S SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS NOTICE OF INTENT TO SEEK PENALTY OF DEATH

Standby counsel have filed yet another supplemental memorandum in support of their efforts to dismiss the Notice of Intent to Seek a Sentence of Death and, in so doing, have demonstrated again that they continue to misunderstand the Supreme Court's decisions in Ring v. Arizona, 122 S. Ct. 2428 (2002), Apprendi v. New Jersey, 530 U.S. 466 (2000), and Jones v. United States, 526 U.S. 227 (1999). Quite simply, these cases stand for the proposition that, regardless of what they are called, any facts that increase the maximum punishment that may be imposed upon a defendant must be reviewed by the grand jury, as mandated by the Fifth Amendment, and found beyond a reasonable doubt by a jury under the Sixth Amendment. Sattazahn v. Pennsylvania, 123 S. Ct. 732, 739 (Jan. 14, 2003). The decision in Sattazahn did nothing to change this. While standby counsel's predictions regarding the views of individual justices about the distinction between an "element" and "the functional equivalent of an element" may be interesting, they do not change the fact that the superseding indictment in this case (which includes special findings) ensures compliance with the Fifth Amendment and that the Federal Death Penalty Act requires the jury to find the existence of aggravating factors beyond a

reasonable doubt as required by the Sixth Amendment. This is why every court that has considered the same challenges made by standby counsel to the FDPA has rejected them. United States v. Johnson, __ F. Supp.2d __, 2003 WL 43363 (N.D. Iowa Jan. 7, 2003) (construing 21 U.S.C. § 848); United States v. Fell, 217 F. Supp.2d 469 (D. Vermont 2002); United States v. Regan, 221 F. Supp.2d 672 (E.D. Va. 2002); United States v. Church, 218 F. Supp.2d 813 (W.D. Va. 2002); United States v. Lentz, 225 F. Supp.2d 672 (E.D. Va. 2002).

Standby counsel's complaints about the role of the Federal Rules of Evidence in a federal capital prosecution after Sattazahn are also misguided. Although it is true that the Rules of Evidence do not apply to sentencings, the FDPA provides that "information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c). As we noted in our earlier pleadings, the Supreme Court has held that relaxed evidentiary standards are appropriate at capital sentencing hearings. See Gregg v. Georgia, 428 U.S. 153, 203-04 (1976). Moreover, Congress has spoken on the evidentiary standards, as is their province. "[W]here Congress has spoken, [the courts] have deferred to the 'traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts' absent countervailing constitutional constraints." Steadman v. SEC, 450 U.S. 91, 95 (1981). Thus, it does not matter whether the aggravating factors are termed "elements" or "functional equivalents of elements," because Congress set forth the evidentiary standards to be used to prove aggravating factors. Consequently, this latest effort by standby counsel to dismiss the Notice of Intent to Seek a Sentence of Death must fail.

Respectfully submitted,

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Certificate of Service

I certify that on the 26th day of February 2003, a copy of the foregoing pleading was provided to defendant Zacarias Moussaoui through the U.S. Marshals Service and faxed and mailed to the following::

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